FILED
941561 MAR 21 1995
OFFICE OF THE CLERK

No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BETHLEHEM MINERALS COMPANY,
BETHLEHEM MINES CORPORATION,
BETH-ELKHORN CORPORATION AND
BETHENERGY MINES INC.,

Petitioners,

v.

CHURCH AND MULLINS CORPORATION, CLAUDE JOHNSON,
CHARLIE JOHNSON, JACK JOHNSON, MARTHA KENDRICK,
PRISCILLA STILTNER, BEN JOHNSON, MOLLY THORNBERRY
AND BETTY JANE JOHNSON STEWART

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI

KENNETH C. BASS, III
Counsel of Record
BENJAMIN R. CIVILETTI
VENABLE, BAETJER, HOWARD
& CIVILETTI, L.L.P.
1201 New York Ave. N.W.
Suite 1000
Washington, D.C. 20005
(202) 962-4890

Of Counsel:

KATHLEEN M. MILLS
BETHLEHEM STEEL CORPORATION
Martin Tower
Bethlehem, PA 18106
(215) 694-6750

G. STEWART WEBB, JR.
VENABLE, BAETJER & HOWARD,
L.L.P.
2 Hopkins Plaza
Baltimore MD 21201
(410) 244-7565

LIVELY M. WILSON
JOSEPH L. HAMILTON
SITTES & HARBISON
400 West Market Street
Suite 1800
Louisville, Ky 40202-3352
(502) 587-3400

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

Question Presented

Whether petitioners were denied Due Process of Law, in contravention of the decision in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), when a Justice of the Kentucky Supreme Court recused himself because he had a pecuniary interest in this case, but then personally selected as the Special Justice to replace him a practicing attorney who eventually authored the 4-to-3 decision which overruled the unanimous decision of the intermediate appellate court and reinstated a $17,000,000 judgment against the petitioners.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	8
I. The Decision Affirming the $17,000,000 Damage Award Against Petitioners Was a 4-to-3 Decision in an Opinion Authored by A Special Justice Selected by a Recused Justice Whose Direct, Personal and Substantial Pecuniary Interest Rendered His Participation in this Case a Denial of Due Process	8
II. Even if the Recused Justice Had No Personal Pecuniary Interest in the Decision, Bethlehem Was Denied Due Process of Law When He Chose His Own Successor to Sit in Judgment of this Case	13
CONCLUSION	15
APPENDIX	1a

TABLE OF AUTHORITIES

Cases — Page

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) ..... *passim*

Arnold v. Eastern Airlines, Inc., 712 F.2d 899 (4th Cir. 1983) 14

Brinkerhoff-Faris Trust and Savings Co. v. Hill 281 U.S. 673 (1930) 7

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 7

Eddings v. Oklahoma, 455 U.S. 104 (1982) 7

Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) 7

In re Murchison, 349 U.S. 133 (1955) 10

Kentucky Utilities v. South East Coal Company, 836 S.W.2d 407 (Ky 1992) *cert. dismissed under Rule 46*, 113 S. Ct. 1147 (1993) ..... *passim*

Moody v. Simmons, 858 F.2d 137 (3rd Cir. 1988) ... 14

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 7

Stringer v. United States, 233 F.2d 947 (9th Cir. 1956) 14

Swiss Oil Corp. v. Hupp, 69 S.W.2d 1037 (Ky. 1934) 3

TABLE OF AUTHORITIES

Page

Cases

Tumey v. Ohio, 273 U.S. 510 (1927) 9

Constitutional Provisions

Kentucky Constitution § 123 4

United States Constitution, Fourteenth Amendment, Due Process Clause .....*passim*

Other Authorities:

Challenges Filed Over High Court's Substitute Judges, LEXINGTON HERALD-LEDGER, June 25, 1992 4

Ky. Judicial Ethics Opinions JE-9, JE-32, JE-41 9

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

BETHLEHEM MINERALS COMPANY,
BETHLEHEM MINES CORPORATION,
BETH-ELKHORN CORPORATION and
BETHENERGY MINES INC.,
Petitioners

v.

CHURCH and MULLINS CORPORATION,
CLAUDE JOHNSON, CHARLIE JOHNSON
JACK JOHNSON, MARTHA KENDRICK,
PRISCILLA STILTNER, BEN JOHNSON, MOLLY
THORNBERRY and BETTY JANE JOHNSON STEWART,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

Petitioners respectfully ask that a writ of certiorari be issued to review the judgment of the Kentucky Supreme Court in this case.

OPINIONS BELOW

The decision of the Kentucky Supreme Court (App., *infra*, 1a-15a) is reported at 887 S.W.2d 321. That Court's opinion denying rehearing (App., *infra*, 16a-18a) is reported at 887 S.W.2d 327.

JURISDICTION

The Kentucky Supreme Court entered its judgment on June 4, 1992 (App., *infra*, 1a) and denied a timely petition for rehearing on November 23, 1994 (App., *infra*, 18a). On February 13, 1995, Justice Stevens entered an order extending the time to file this petition to and including March 23, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides that "No State shall [deprive] any person of life, liberty or property, without due process of law . . . ."

STATEMENT

This petition arises from the final decision of the Kentucky Supreme Court in a land title case that began in 1964 when petitioners Bethlehem Minerals Company, Bethlehem Mines Corporation, Beth-Elkhorn Corporation and BethEnergy Mines Inc. ("Bethlehem")[1] filed suit to enjoin one of the respondents from interfering with their coal mining operations in Pike County, Kentucky. The case evolved into a mineral title dispute that raised novel issues under Kentucky law. After protracted proceedings in the trial court, a title judgment was finally entered in 1986. That judgment held that while Bethlehem owned the majority of the mineral interest in the disputed tract, a number of the

---

[1] Petitioners' Rule 29.1 list of corporate affiliates was previously filed with Petitioners' December 16, 1994 Application for a Stay Pending Certiorari which was denied by Justice Stevens on December 20, 1994.

respondents owned a significant portion of the mineral estate. Following further trial proceedings on damage issues, the trial court held on February 25, 1987 that the respondents were entitled to damages, including an unprecedented award of willful trespass damages, of $16,947,778.[2]

Bethlehem's appeal to the intermediate Kentucky Court of Appeals was successful. The willful trespass finding and damage award were set aside in a unanimous 3-0 decision which applied the existing Kentucky law as set forth in *Swiss Oil Corp. v. Hupp*, 69 S.W.2d 1037 (Ky. 1934). The Kentucky Court of Appeals held as a matter of law that Bethlehem's mining activities could not be deemed a willful trespass because title litigation was pending, especially where Bethlehem had already twice obtained preliminary injunctive relief based on a finding that it had record title and a probability of establishing its title to the disputed mineral estate.

The respondents then sought and obtained discretionary review in the Kentucky Supreme Court. While the motion for discretionary review was pending in that court, Bethlehem suggested that Justice Dan Jack Combs, one of the seven justices of that court, should not sit on this appeal since he had been the trial counsel for several of the respondents in this same case for more than 10 years. Justice Combs' role as trial counsel in this contingent fee case put him in a position where he had a personal interest in the outcome of this case that went beyond an advocate's identification with a client's legal position and extended to a direct, personal and substantial pecuniary interest.

---

[2] Bethlehem has now paid $37,571,426.56, representing the judgment amount plus 10% compound interest and an appellate penalty, into the registry of the Pike County Circuit Court in full satisfaction of the judgment. Bethlehem will, of course, be entitled to a return of that payment if this Court were to grant review and set the judgment aside.

Justice Combs recognized that he could not sit in judgment over this appeal and he therefore recused himself.[3] But, as Bethlehem was to learn only after a 4-3 Supreme Court decision re-instating the willful trespass finding and damage award was rendered, he improperly continued to participate in the case by personally selecting John Doug Hays, a practicing lawyer, to replace him as a Special Justice to hear this appeal. Special Justice Hays cast the deciding vote and was the author of the majority opinion in this case.

Promptly after the Kentucky Supreme Court decision was announced, Bethlehem filed a timely petition for rehearing. Among the issues raised was a challenge to the appointment and participation of Special Justice Hays. At that time Bethlehem did not know how Special Justice Hays had been selected for that appointmentand participation. The rehearing petition was limited to the grounds then available to Bethlehem: 1) that the Supreme Court lacked authority to appoint a Special Justice to replace a single recused Justice; and 2) that the participation of Special Justice Hays became improper when he became a candidate for the United States House of Representatives in January 1992, a few months after the oral argument of this case and a few months before his decision was announced.[4] Bethlehem's rehearing petition specifically stated that the apointment and participation of Special Justice Hays "violat[ed] Bethlehem's due process rights under the Kentucky and United States Constitutions." (*Beth. Pet. for Rehearing* at 3, in Ky. Sup. Ct., No. 87-CA-000988, 87-CA-0001052).

The day after the rehearing petition was filed, Bethlehem learned for the first time that Justice Combs, notwithstanding his recusal, had personally selected John

---

[3] The order granting discretionary review stated that Justice Combs was not participating. No formal order of recusal was entered.

[4] The Kentucky Constitution specifically provides that "no justice of the Supreme Court . . . shall . . . run for elective office other than judicial office . . . ." Ky. Const. § 123.

Doug Hays to serve as his replacement. According to published reports, Justice Combs "suggested to the chief justice that [John Doug Hays] would be a fine" Special Justice for this case, at least in part because Justice Combs knew that Hays "was in politics" and Justice Combs "wanted to give [Hays] some exposure." *Challenges Filed Over High Court's Substitute Judges*, LEXINGTON HERALD-LEDGER, June 25, 1992 at B1.

Promptly upon learning this fact, Bethlehem filed a Supplemental Motion to Recuse Special Justice Hays, specifically noting that Justice Combs' former law partner, Herman Lester, continued to represent the respondents in this case. Bethlehem also lodged a Supplemental Petition for Rehearing which noted that this new information about the Hays' appointment "confirms the unconstitutionality of the appointment" (*Beth. Supp. Petn. for Rehearing)*, and that the selection of Special Justice Hays by Justice Combs "clearly violate[d] Bethlehem's due process rights under the United States Constitution." (*Bethlehem's Mem. in Support of Supp. Motion to Recuse Special Justice John Doug Hays*, at 3).[5]

On August 25, 1992, while Bethlehem's rehearing petition and its motions to recuse were pending, the Kentucky Supreme Court announced its decision in *Kentucky Utilities v. South East Coal Company*, 836 S.W.2d 407 (Ky. 1992) *cert. dismissed under Rule 46*, 113 S. Ct. 1147 (1993). In that decision the Kentucky Court upheld its own procedure for appointing Special Justices, rejecting arguments based on the Kentucky Constitution. That decision relied on a provision in the Court's procedure that required 10-days-notice to the parties when a Special Justice was appointed. The 10-day-notice, according to the Supreme Court, was designed to give "[t]he parties time to raise valid

---

[5] The Kentucky Supreme Court refused to accept these pleadings for filing. That court also refused to accept the subsequent supplemental rehearing pleadings. It did accept Bethlehem's initial Petition for Rehearing and Motion to Recuse Special Justice Hays, both of which were filed on June 24, 1992.

objections to the appointment of the Special Justice." *Id.* at 409. Despite the fact that its own rule required appointment "[a]t least ten days before the case is scheduled for oral argument", *id.*, in this case the order of appointment was made and entered on the same day as the oral argument with no prior notice to Bethlehem.

The procedure for appointing Special Justices had been adopted without publication by the Supreme Court in 1989. The procedure provided that the normal appointment process is for the Chief Justice to select a Special Justice from among a list of 10 possible replacements provided to him by each of the other Justices at the beginning of that court's annual term. *Id.* at 410. That procedure was not followed in this case because Justice Combs had personally designated John Doug Hays as his replacement. The failure of the Kentucky Supreme Court to follow its own procedure compounded the constitutional deprivation and Bethlehem brought this additional objection before the Kentucky Supreme Court in its Second Supplemental Petition for Rehearing. In advancing these arguments against the participation of Special Justice Hays, Bethlehem specifically relied on this Court's decision in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (*see, e.g., Mem. in Support of Motion to Recuse* at 13, incorporated by reference in the *Pet. for Rehearing* at 2).

In response to Bethlehem's rehearing petitions and recusal motions, the Kentucky Supreme Court took an unusual series of steps. Three days after the *Kentucky Utilities* decision, Special Justice Hays, "being advised of the motion of [Bethlehem] for his recusal . . . sua sponte recuse[d] himself from further deliberation and participation in the proceedings" of the appeal. (*Spec. Jus. Hays' Order of August 28, 1992*). On that same day the Kentucky Supreme Court entered an order denying Bethlehem's recusal motion "as being moot" and granting Bethlehem's request for oral argument on its Petition for Rehearing. (*Chief Justice Stephens' Order of August 28, 1992).* A year later, the

Kentucky Supreme Court scheduled oral argument on Bethlehem's Rehearing Petition.[6]

Almost a year after the oral argument, the Kentucky Supreme Court denied rehearing and affirmed the decision and opinion of Special Justice Hays in a brief order entered on November 23, 1994. (App., *infra*, 16a) The Supreme Court's entire discussion of Bethlehem's federal due process argument was a single clause stating that there was "nothing in the opinion of this Court to support the bald assertion by the petitioners that they were denied due process of law in this matter." (App., *infra*, 17a) The Kentucky Supreme Court held that Bethlehem's "argument as to the validity of the appointment of a special justice to this Court was resolved in the case of *Kentucky Utilities v. South East Coal Company*." *Id.* The Kentucky Supreme Court thus ruled on the federal constitutional issues raised during the rehearing proceedings.[7] The Supreme Court did not address the infirmity in the original appointment of Special Justice Hays, relying entirely on his prospective-only recusal as the basis

---

[6] Oral argument was not held until December 15, 1993, a few weeks after Bethlehem lodged a Second Supplemental Petition for Rehearing.

[7] The order denying rehearing also addressed various state law arguments advanced in the petitions for rehearing. The fact that the Kentucky Supreme Court specifically passed on Bethlehem's federal Due Process arguments is sufficient to establish this Court's jurisdiction to grant certiorari in this case. *See, e.g., Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975); *Eddings v. Oklahoma*, 455 U.S. 104,113-14 n. 9 (1982). As to those specific issues raised in the supplemental pleadings that were not accepted for filing by the Kentucky Supreme Court, those aspects have been raised in a timely manner within the meaning of this Court's numerous decisions sustaining its certiorari jurisdiction to review questions raised in rehearing petitions if those questions could not have been raised earlier, and despite the silence of the state court in passing on those questions. *See, e.g., Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930); *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932).

for leaving his opinion and the 4-to-3 decision in place as the final state court ruling.

REASONS FOR GRANTING THE PETITION

I. The Decision Affirming the $17,000,000 Damage Award Against Petitioners Was a 4-to-3 Decision in an Opinion Authored by A Special Justice Selected by a Recused Justice Whose Direct, Personal and Substantial Pecuniary Interest Rendered His Participation in this Case a Denial of Due Process

There is no doubt that Justice Combs could not have participated in the decision of this case without denying Bethlehem its federal Due Process rights as that clause was interpreted and applied in the *Aetna Life* case. As the original trial counsel for a number of the respondents who have been awarded a multi-million dollar judgment, Justice Combs' participation in the appeal would have been not only improper, it would have been unconstitutional. Matters of public record demonstrate that Justice Combs still had a direct, personal and pecuniary interest in this case at the time it came before the Kentucky Supreme Court.[8] That

---

[8] The facts that support this conclusion are simply stated. After the November 23, 1994, decision of the Kentucky Supreme Court denying Bethlehem's petitions for rehearing, Bethlehem deposited $37,571,426.56 into the registry of the Clerk of the Pike County, Kentucky Circuit Court to secure payment of the $17,000,000 judgment, plus accrued interest. Thereafter parties with an interest in the judgment proceeds filed pleadings relating to their claims. Those filings indicate that this case is a contingency fee case and that Herman Lester, among other counsel, is to receive 40% of the judgment proceeds as attorneys' fee. **Exhibit 22**, *Memorandum of Respondents in Support Motion to Disqualify Counsel and in Support of Cross-Claim* (Pike County Cir. Ct.). Prior to becoming a Justice of the Kentucky Supreme Court, Justice Combs was a partner of Herman Lester, practicing in the firm of Combs and Lester, PSC. That firm, according to public records, has 100 outstanding shares, 50 of which are owned by Mr. Lester. On October 5, 1989, the firm changed its name to Herman W. Lester, PSC. The

pecuniary interest not only disqualified him from participating in the decision of the case, it should have disqualified him from hand-picking his replacement.

The actions of the Kentucky Supreme Court cannot be reconciled with this Court's decision in *Aetna Life*, *supra*. The question in that case involved a similar post-decisional Due Process challenge to the participation in a state supreme court of the author of a majority opinion. The principal issue that had been decided by the Alabama Supreme Court in *Aetna Life* was a previously-undecided issue of the availability of punitive damage claims based on a bad-faith denial of insurance coverage. The party adversely affected by a 5-to-4 decision learned after the decision that the author of the Alabama court's majority opinion had, while that appeal was pending, himself filed two lawsuits in his own behalf against insurance companies, alleging a bad-faith denial of coverage. On the basis of that fact, the aggrieved party sought a retroactive recusal and rehearing. Relief was denied by the Alabama court, again by a 5-to-4 vote.

This Court granted review, unanimously reversed the Alabama court and vacated the tainted appellate decision. This Court concluded that the authoring justice had a "[d]irect, personal, substantial and pecuniary" interest in the outcome of the case. *Aetna Life*, *supra*, at 824. Relying on a line of cases tracing back to *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court re-affirmed its prior decision in *In re Murchison*, 349 U.S. 133, 136 (1955), that no individual

---

amendment referred to the "shareholders", indicating that Justice Combs may have retained his interest in the firm after his judicial election in 1988. Under Kentucky ethics rulings, a jurist is permitted to continue to collect fees for work performed prior to assuming judicial office and is also permitted to participate in fees earned thereafter by partners who assume responsibility for the judge's matters. *See Ky. Judicial Ethics Opinions JE-9, JE-32, JE-41.* All of these matters of public record justify our contention that Justice Combs retained a pecuniary interest in the decision of this appeal at the time he improperly and personally chose attorney John Doug Hays to serve as the Special Justice for this appeal.

"can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." Noting that the issue of bad-faith-refusal-to-pay-claims was "unsettled" at the time of the Alabama decision, this Court recognized that when the challenged justice "[c]ast the deciding vote, he did not merely apply well-established law and in fact quite possibly made new law." *Aetna Life*, *supra*, at 822. Because the legal issue in the *Aetna Life* case was identical to an issue in the challenged justice's own lawsuits, this Court concluded that the justice had "[a]cted as 'a judge in his own case'" in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 824.

This Court next considered whether the fact that the Alabama justice's personal litigation included a class action on behalf of all the Alabama justices required a recusal of the entire state supreme court. This Court concluded that "[s]uch allegations do not constitute a sufficient basis for requiring recusal under the Constitution." *Id.* at 825. The result of this holding was that the participation of the author of the 5-to-4 majority opinion had been a denial of Due Process, but the participation of the remaining eight justices was valid.

The Court in *Aetna Life* then turned to the issue of remedy. Speaking for the Court, the Chief Justice stated that "[w]e are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote." *Id.* at 827-28. This Court held that the only acceptable remedy was to vacate the decision and remand for further proceedings. This result necessarily rests on a federal Due Process footing since this Court does not have general supervisory authority over state courts.

Petitioners submit that the principles enunciated in *Aetna Life* compel the conclusion that the decision of the Kentucky Supreme Court in this case cannot stand. Here, as in *Aetna Life*, the tainted justice authored a decision establishing an unprecedented result and cast the deciding

vote.[9] Although Special Justice Hays ultimately recognized that his participation was improper, and therefore recused himself from further proceedings, the decision that he authored was allowed to stand as the decision of the Kentucky court.

We submit that Special Justice Hays' characterization of his recusal as "sua sponte", and his effort to make that recusal "prospective only", cannot be invoked as a shield that precludes this Court from setting the Kentucky decision aside. In the first place, it is implausible to suggest that the recusal was indeed "sua sponte". At the time that recusal order was entered, Bethlehem had raised substantial constitutional challenges to the appointment and participation of Special Justice Hays. Bethlehem had argued that his selection by Justice Combs was unconstitutional since Justice Combs was himself precluded from participating in the case in any way. Bethlehem had argued that the fact that Special Justice Hays had run for elective political office while serving on the Kentucky Supreme Court rendered him ineligible to decide this appeal in light of § 123 of the Kentucky Constitution.[10] Only days before his recusal the Supreme Court had itself dealt with a state constitutional challenge to its procedure for appointing a Special Justice.

We respectfully submit that Special Justice Hays and the Kentucky Supreme Court cannot be allowed to "solve this problem" by the convenient device of a "prospective-only sua sponte" recusal. Since the original selection of Special Justice Hays by Justice Combs was

---

[9] This is the only known case in Kentucky where a willful trespass finding and the resulting punitive damages have been upheld in a mineral title dispute where litigation was pending. The critical importance of Special Justice Hays' participation is underscored by the fact that he had significant experience in litigating Eastern Kentucky mineral title cases, experience that was otherwise lacking on the Kentucky Supreme Court.

[10] *See* n. 4, *supra.*

unconstitutionally tainted, the subsequent recusal which left his opinion as the final decision of the state judicial process did not remove that stain. The Kentucky Supreme Court was plainly wrong when it stated that Special Justice Hays' recusal "granted [Bethlehem] the relief requested." (App., *infra*, 17a) Bethlehem requested a decision by a properly constituted and untainted tribunal; it did not get that decision. Under the holding in *Aetna Life* a majority decision authored by a constitutionally-disqualified jurist cannot stand as the law of the case.

It is important to note that the Kentucky justices who voted to deny rehearing never reached the merits of Bethlehem's challenges to the participation of Special Justice Hays. The court avoided ruling on the merits of those arguments by mistakenly concluding that Special Justice Hays' prospective-only recusal rendered Bethlehem's arguments moot. The *Aetna Life* decision established the federal constitutional principle that a prospective-only recusal does not cure the original taint and that vacature is the only acceptable remedy.[11]

---

[11] It is important to note that the Kentucky Supreme Court's cursory reference to its *Kentucky Utilities* decision was not a ruling on the merits of Bethlehem's challenge to Justice Combs' selection of his own successor. The *Kentucky Utilities* case did not present a challenge to the self-selection of a substitute for a recused justice. The only issue decided in *Kentucky Utilities* was to reject an argument that because the Kentucky Constitution empowers the Governor to select replacement justices when two or more justices are recused and limits the Chief Justice's appointment powers to other courts, there was no authority for the Supreme Court to choose a substitute when only one justice was recused. *See generally, Kentucky Utilities, supra.* There was no discussion in the court's opinion of the constitutionality of allowing a disqualified Justice to select his own successor to serve as a Special Justice. There was also no discussion of the effect on Petitioners' Due Process rights of the failure to give the 10-days-notice that the Kentucky Supreme Court had concluded was the primary element that rendered the procedure fair to the parties.

Bethlehem submits that any effort to distinguish this case from *Aetna Life* on the grounds that Justice Combs did not sit while the tainted Alabama justice did sit is unpersuasive. If it is unconstitutional under the federal Constitution for a state judge who has a pecuniary interest in a case to decide that case, then it is equally unconstitutional for the disqualified judge to designate the individual who will act instead.

Because the decision in this case was authored by a Special Justice who had been personally selected by a jurist who was constitutionally barred from any participation in the case, certiorari should be granted and the Kentucky Supreme Court decision vacated on the authority of the *Aetna Life* decision.

II. Even if the Recused Justice Had No Personal Pecuniary Interest in the Decision, Bethlehem Was Denied Due Process of Law When He Chose His Own Successor to Sit in Judgment of this Case

Even if the facts in this case could be distinguished from those in *Aetna Life*, the appointment of Special Justice Hays violated the Due Process Clause. *Aetna Life* and the cases relied upon in that decision establish that judicial recusal is, in some cases, required as a matter of federal constitutional law. The appointment of Special Justice Hays by Justice Combs violated a basic principle of the notion of recusal, a principle that is itself a part of the fundamental requirements of Due Process. That principle is simply stated -- if a jurist is disqualified for any reason from participating in the decision of a specific case, it is a denial of Due Process of Law for that jurist to designate another individual to serve as an alternate judge to replace him.

It is inherent in the doctrine of recusal that a recused jurist must not participate in any meaningful way in the disposition of the case. Under established principles of federal procedure, "[o]nce a judge has disqualified himself,

he or she may enter no further orders in the case. . . . His power is limited to performing ministerial duties necessary to transfer the case to another judge." *Moody v. Simmons*, 858 F.2d 137, 143 (3rd Cir. 1988) (citations omitted). A "judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred." *Arnold v. Eastern Airlines, Inc.*, 712 F.2d 899, 900 (4th Cir. 1983) (a judge who has recused himself cannot vote on a motion to hear a case en banc); *see also Stringer v. United States*, 233 F.2d 947 (9th Cir. 1956) (error for a trial judge to resume control of a case after recusing himself). Such ministerial orders, activities that fall within the so-called "housekeeping" function, do not extend to personally selecting a practicing attorney to serve as a substitute justice.

The test for determining whether a post-recusal action is or is not a permissible housekeeping action is whether the effect on the case is "substantial" or immaterial. Hand-picking a substitute is, as the result in this case demonstrates, "substantial participation" in the decision of a case, especially when that replacement becomes the justice who casts the deciding vote and authors the majority opinion. If a judge is required to step aside, then the recusal must be total and complete. Designating one's own replacement is not a recusal, it is an effort to exercise a continuing influence over the outcome of the case. When a judge designates a replacement, that decision can indeed "affect the determination" of the case as the facts here well illustrate.

In assessing the impact of Justice Combs' selection of Special Justice Hays, it is significant to note that this was not the act of a trial judge in a rural area who, by necessity, is required personally to select a temporary replacement. In this case the previously-established procedures required the recused Justice to refrain from further participation, leaving the choice solely to the Chief Justice. That procedure, had it been followed here, would have avoided the taint of allowing Justice Combs to step aside while maintaining an influence over the result through his hand-picked replacement. Because his participation was not necessary to obtain a replacement, his action cannot be characterized as a

ministerial or housekeeping function and should be held as an impermissible continued participation in the decision of the appeal.

CONCLUSION

If, as we believe to be the case, Justice Combs retained a direct, personal and pecuniary interest in the outcome of this appeal, then his designation of Special Justice Hays is directly contrary to the holding in the *Aetna Life* case. If Justice Combs did not have such an interest, the concept of Due Process still required him to refrain entirely from exercising any influence over the appellate decision once he had recused himself because of his personal involvement in the case. In either event, Justice Combs' personal selection of Special Justice Hays violated the Due Process Clause, particularly since Special Justice Hays authored the 4-to-3 decision of the court and then recused himself. Petitioners therefore submit that this Court should grant a writ of certiorari to review the decision of the Kentucky Supreme Court in this case.

Respectfully submitted,

Kenneth C. Bass, III
(Counsel of Record)
Benjamin R. Civiletti
VENABLE, BAETJER,
HOWARD & CIVILETTI LLP
1201 New York Ave., N.W.
Washington, D.C. 20005
(202) 962-4890

Lively M. Wilson
Joseph L. Hamilton
STITES & HARBISON
400 West Market Street
Suite 1800
Louisville, KY 40202-3352
(502) 587-3400

OF COUNSEL:

Kathleen M. Mills
BETHLEHEM STEEL CORPORATION
Martin Tower
Bethlehem, PA 18106
(215) 694-6750

G. Stewart Webb, Jr.
VENABLE, BAETJER &
HOWARD, LLP
2 Hopkins Plaza
Baltimore, MD 21201
(410) 244-7565

APPENDIX

BEST AVAILABLE COPY

RENDERED: June 4, 1992
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

90-SC-000081-DG
90-SC-000784-DG

CHURCH AND MULLINS CORPORATION;
CLAUDE JOHNSON, Individually, etc.;
CHARLIE JOHNSON; JACK JOHNSON;
MARTHA KENDRICK; PRISCILLA STILTNER;
HAZEL JOHNSON; BEN JOHNSON; ;MOLLY
THORNBERRY; BETTY JANE JOHNSON
STEWART
MOVANTS/CROSS- RESPONDENTS

ON REVIEW FROM COURT OF APPEALS
V (Pike Circuit Court No. 00-72-88-43D)
NOS. 87-CA-000988 and 87-CA-001052

BETHLEHEM MINERALS COMPANY;
BETHLEHEM MINES CORPORATION;
BETH-ELKHORN CORPORATION;
BETH ENERGY MINES, INC
RESPONDENTS/CROSS-MOVANTS

OPINION OF THE COURT BY
SPECIAL JUSTICE JOHN DOUG HAYS
AFFIRMING IN PART AND REVERSING IN PART

This case involves two judgments of the Pike Circuit Court regarding several separate parcels of property

located in Pike County, Kentucky, but known collectively throughout this litigation as Tract 52. The first judgment determined title to the property, and the second awarded damages for trespass.

This action commenced when Bethlehem Mines, hereafter Bethlehem, filed a complaint against John Johnson, claiming title to the mineral estate underlying the 375 acres of land known as Tract 42. Johnson counterclaimed claiming ownership of the surface as well as the minerals. Subsequent to initiation of this litigation, John Johnson dies, and his heirs are now claimants in this proceeding. Church and Mullins Corporation was and is a lessee of certain mineral rights granted to it by John Johnson.

The act which precipitated this litigation was in 1964 when a survey team from Bethlehem appeared on John Johnson's property. John Johnson forcefully evicted them. Bethlehem, by affidavit of good title, sought and obtained an ex parte temporary restraining order from Circuit Judge Lowe which prevented Mr. Johnson from interfering with surface surveying.

In 1965, John Johnson moved to quash the restraining order. Bethlehem responded that it was using the restraining order to survey. Bethlehem further contended that the motion was premature because the rights of the parties had not been adjudicated. The court denied Johnson's motion to quash.

Bethlehem in 1975 was in possession of a report from its attorney, Francis Rice, discussing the "ramifications and complications" involving the title to the minerals under Tract 42. That report recites many of Johnson's claims to title. It specifically puts Bethlehem on notice that the primary deed it relies upon for title to the 375 acre tract only covers the Fleming and Estep patents. The language is as follows: "On May 12, 1890, when Denny Vanover conveyed the coal to Richard M. Broas, Vanover had no title of record, except to the land covered by the Fleming and Estep surveys."

In 1968, Bethlehem removed in excess of 3,000 tons of coal from the disputed tracts without providing any notice to the court or Johnson that it was conducting mining operations on the disputed premises.

No further mining was conducted on the premises until 1970, at which point Johnson and another lessee leased portions of Tract 42 to Church and Mullins. Church and Mullins thereafter began mining operations of the coal underlying a 93 3/4 acre tract known as the "Childers Patent." At about the same time, Bethlehem had entered the same tract, again without disclosure to the court or to any parties, and commenced mining operations. In 1971, Bethlehem filed an amended complaint adding Church and Mullins as a party defendant and seeking to quiet title to the minerals. Bethlehem sought a temporary injunction to prohibit Johnson and Church and Mullins from any further mining pending a decision on title.

Bethlehem filed a map prepared by Mr. Lewis Quick, Bethlehem's chief property engineer, as well as an affidavit sworn to by Quick in support of the injunction. Since the court has not yet litigated the title issue, it granted the relief sought by Bethlehem. The map filed by Quick depicting Bethlehem's mining activities was erroneous. In fact, as of the date of Quick's affidavit, Bethlehem, contrary to the sworn declarations of Quick, had already extended its mining operations several hundred feet into the Childers Patent tract. Thereafter, Bethlehem continued mining and removed several hundred thousand tons of coal from the Childers Patent which belonged to Johnson.

In 1976, after most of the disputed coal had been mined, the parties learned of Bethlehem's mining activity. At that point, Johnson and Church and Mullins filed their claim for willful trespass and damages.

The final decision on the question of title was made by the Pike Circuit Court in 1986. As the Court of Appeals points out, the trial judge entered a lengthy, well-reasoned opinion and judgment determining the issue of title. The Pike Circuit Court awarded title to the minerals of 164

acres underlying Tract 42 to Bethlehem, while the Johnson interests were successful in being awarded title to the remaining 211 acres of surface and minerals. The opinion of the Pike Circuit Court regarding title was affirmed by the Court of Appeals.

The trial court thereafter in a separate judgment awarded damages and prejudgment interest against Bethlehem in the amount of $16,947,778.00. The trial court found that the trespass by Bethlehem was willful, and the Court of Appeals reversed, finding that Bethlehem was an innocent trespasser. The trial court found that the prejudgment interest was in order, and the Court of Appeals reversed. The trial court awarded post-judgment interest at a rate of 10 percent, and the Court of Appeals reversed, finding that post-judgment interest should have been 12 percent, as provided by KRS 360.040. The trial court found that Johnson and Church and Mullins were not entitled to pre-1975 damages under KRS 433.270, and the Court of Appeals affirmed. We granted review of these holdings.

The issues may be summarized as follows:

1. Whether the trial court's determination of title accords with the trial facts and the law's application.

2. Whether the trial court's holding of willful trespass has a factual basis under the principles of Swiss Oil Corporation v. Hupp, 253 Ky. 552 69 S.W.2d 1037, (1934) and related cases.

3. Whether the trial judge abused his discretion in awarding prejudgment interest.

4. Whether pre-1975 damages should be awarded under KRS 433.270.

1. The Title Issue

This Court has carefully considered numerous title theories advanced by the respective parties, including those raised for the first time in this Court by the respondent. The trial court, in a very thorough, well-documented opinion, adjudicated the respective interests of the parties

on the disputed premises. The appropriate standard of review is whether or not the trial court was clearly erroneous or abused its discretion. As the Court of Appeals opined, there is an abundance of title law, but in order to make application thereof there must be factual support. The Court of Appeals found that the trial court's determination of the intricate title questions involved was not clearly erroneous. Suffice to say, this Court, upon review, cannot say the trial court erred in adjudicating the title interests of the competing parties. It is not for us to determine whether or not we would have reached a different conclusion, faced with the same evidence confronting the trial court.

Bethlehem relied to a great extent on the 1865 Gallop and Sowards survey to support its title claims. The trial court found the Gallop and Sowards survey to be void. We, along with the Court of Appeals, are not willing to go that far. However, as with the trial court and the Court of Appeals, we agreed that Bethlehem failed to prove that the contested land fell within that survey.

Our role is not to substitute our opinions for those of the trial court in the absence of clear error; therefore, we affirm the opinion of the Court of Appeals on the issue of title, the Court of Appeals having correctly applied the standard of review.

2. The Trespass Issue

The appropriate standard of review is whether or not the trial court was clearly erroneous or abused its discretion in finding that Bethlehem's trespass was willful. If it was not, then its holding shall not be disturbed by an appellate court.

In determining the nature of the trespass committed by Bethlehem, the trial court had to find whether the trespass was innocent or willful. The law is that every trespass presumed willful, with the burden upon the trespasser to prove his innocence. Swiss Oil, supra at 1041. The Test of willfulness is whether a trespass

> was perpetrated in a spirit of wrongdoing, with the knowledge that it was wrong, or whether it was done under a bona fide dispute, as where the circumstances were calculated to induce or justify the reasonably prudent man, acting with a proper sense of the rights of others, to go in and to continue along the way.

See also, Koeb v. Conley, 160 Ky. 91, 169 S.W. 575, 581 (1914), and Sandlin v. Webb, Ky., 240 S.W.2d 69, 70 (1951).

Bethlehem cites two factors which have traditionally been considered, though not conclusive or exclusive of other factors, in mitigation of a finding of willful trespass.

The first factor cited by Bethlehem is that it relied upon advice of counsel. The evidence it introduced in support of this is a 1965 document designated "Report of Title" prepared by Francis Rice. This document indicates that it merely sought to discuss the many ramifications and complications involving the title to the minerals under Tract 42. This document was apparently prepared by Bethlehem's counsel in 1965 shortly after the initiation of this lawsuit in 1964. The first trespass onto Johnson's coal by Bethlehem was in 1968. The record is silent of any showing by Bethlehem that prior to its entry on Johnson's coal in 1968 that it was ever advised by counsel that it had the legal right to do so. The Court of Appeals points out that the document prepared by Bethlehem's attorney in 1965 "did not deny the existence of a valid title." The document also did not confirm good title in Bethlehem.

The second factor that Bethlehem asserts to establish its innocence is that it had color of title to the subject premises. However, Bethlehem was on notice prior to the 19868 trespass that (i) John Johnson had record title claim to the Childers Patent and (ii) that Johnson was in

adverse possession of the surface of Tract 52. With this knowledge, and while litigation on the issue of title was pending, Bethlehem entered the disputed premises without informing either Johnson or the court.

The factors to be considered by a court, in reviewing a decision characterizing a trespasser as willful or innocent, are succinctly set out in Swiss Oil, supra. That decision indicates that the primary test to be applied is the intention, or the state of mind, of the trespasser based upon the circumstances surrounding the trespass at the time the trespass occurred. As the case point out, determining intention of a party generally cannot be done by direct evidence. The case directs a court to consider the trespasser's ". . .sincerity and his actual intention at the time."

The trial court must review the totality of the circumstances surrounding the trespass to determine whether the trespasser ". . . was acting in good faith and under an honest conviction that he was right in his assumption." Id. at 1041. In determining whether or not Bethlehem' trespass was willful or innocent, the trial court considered the following factors:

a. the actions of Bethlehem throughout the court of litigation and in the field; b. the "cavalier attitude" of its chief property engineer toward the truth; c. the ample time Bethlehem had to litigate the title to the minerals prior to initiation of its mining activities; and d. the "further evidence in the case, and the inferences to be drawn from the evidence showing plaintiffs' willful, knowing conduct and callous and reckless disregard for the property rights of the defendants."

The trial court's opinion stated: "With this knowledge, and with no attempt to resolve first the title question, [Bethlehem] deliberated chose the course of willful and reckless disregard of defendants' irreparable property rights by the entry and removal of the Number 2 Elkhorn seam of coal on Tract 42."

The trial judge rendered findings of fact tending to show the actions of Bethlehem were not bona fide mistakes. There is no evidence showing that the actions of Bethlehem were ever done on the advice of counsel. The document, prepared by its litigation attorney, never advises such action, never confirms title in Bethlehem, nor is there any other evidence in the record showing that this document as prepared by its litigation counsel was relied upon by Bethlehem. The document prepared by its attorney prior to its trespass in 1968, put Bethlehem on notice of the record title claims of John Johnson, and the trial court found that Bethlehem had actual knowledge, through its agents, of the adverse possession of Johnson of Tract 42.

The question of the intent of the trespasser is for the trier of fact to determine. In determining whether or not the trespasser acted in good faith, under an honest conviction that he was right, and with a proper sense of the rights of others, this Court must apply the facts established by the trial Court to the applicable law, unless clearly erroneous. The burden of proof was on Bethlehem to establish its trespass as innocent.

The trial Court found that Bethlehem had failed to offer "persuasive evidence that they were anything but deliberate, willful and reckless in the entering upon and taking of defendant's coal."

One cannot calculate with precision what is in another's mind, and the problem becomes more acute where the "mind" to be probed is that of a corporation, whose intent is, by necessity, the sum of the minds of several natural persons. Therefore, the ultimate question of "good faith" must be found by inferences drawn from all the facts and evidence. These inferences must be drawn from all the facts and evidence. These inferences must be drawn by the trial court. The determination of willfulness is peculiarly a fact question for which the standard of appellate review is well-established. The issue isn't whether or not an appellate court would have decided the

case differently from the trial court. The issue is whether or not the findings of the trial court are clearly erroneous or whether the trial court abused its discretion. Cherry v. Cherry, Ky., 634 S.W.2d 423, 425 (1982). The reliance of Bethlehem on the Swiss Oil decision, as well as the decision in Joyce v. Zachary, Ky., 434 S.W.2d 659, 661 (1968), for the proposition that the 1971 temporary injunction was a sufficient adjudication of title to justify its mining is misplaced. In both Swiss Oil and Joyce, this Court was presented with cases where a trespasser had relied upon an opinion of independent counsel that its title was good. This is not the factual situation presented in the case at bar. A decision by a trial court on a temporary injunction is not a judgment.

In reviewing the facts found by the trial court on the issue of characterizing the trespass, it is our opinion that its findings were not clearly erroneous. In comparing those facts to the standards set out in Swiss Oil, we hold that the Court of Appeals is hereby reversed, and the trial court's Judgment that Bethlehem was willful trespasser is reinstated.

3. Prejudgment Interest Issue

The trial court awarded prejudgment interest to the appellants. Such interest was not to be compounded, but was to be calculated as simple interest. The Court of Appeals, relying upon its determination that the trespass was not willful, reversed the trial court.

Our recent decision, Nucor Corp. v. General Electric Co., Ky., ____ S.W.2d ____ (1991) addresses the evolution of the question of whether or not to award prejudgment interest in actions involving property, or as in that particular case, contract. We are not concerned here as in Nucor with whether the award should be made by judge or jury, as it is now established that the determination of whether or not to award prejudgment interest as consequential flowing damages is a matter for the trial court and not the jury.

The determination as to whether or not to award prejudgment interest is based upon the foundation of equity and justice. It is a determination to be made by the trial court and to be disturbed by an appellate court only upon a showing of an abuse of discretion. Given that the trial court determined that Bethlehem was a willful trespasser, and given the length of time for which the trespass continued, we cannot say the trial court abused its discretion in awarding prejudgment interest. The decision of the Court of Appeals regarding prejudgment interest is, therefore, reversed, and the judgment of the trial court is reinstated.

4. The Pre-1975 Damage Issue

The trial court held that Johnson and Church and Mullins were not entitled to receive double damages as Bethlehem had shown "color of title." The Court of Appeals affirmed. We find no abuse of discretion by the trial court disallowing Johnson and Church and Mullins from recovering double damages and accordingly affirm.

Based on the foregoing, we affirm the Court of Appeals on the issues of title and pre-1975 damages. We reverse the Court of Appeals on the issue of willful trespass and pre-judgment interest. We affirm the trial court and reverse the Court of Appeals holding that interest on the judgment entered by the Pike Circuit Court shall be 121 Percent as opposed to the 10 percent ordered.

Lambert, Leibson, and Spain, JJ., concur. Reynolds, J. dissents with a separate opinion in which Stephens, C.J. and Wintersheimer, J., join.

Rendered: June 4, 1992
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

90-SC-000081-DG
90-SC-000784-DG

CHURCH AND MULLINS CORPORATION;
CLAUDE JOHNSON, Individually, etc.;
CHARLIE JOHNSON; JACK JOHNSON;
MARTHA KENDRICK; PRISCILLA STILTNER;
HAZEL JOHNSON; BEN JOHNSON; ;MOLLY
THORNBERRY; BETTY JANE JOHNSON
STEWART
MOVANTS/CROSS-RESPONDENTS

ON REVIEW FROM COURT OF APPEALS
V (Pike Circuit Court No. 00-72-88-43D)
NOS. 87-CA-000988 and 87-CA-001052

BETHLEHEM MINERALS COMPANY;
BETHLEHEM MINES CORPORATION;
BETH-ELKHORN CORPORATION;
BETH ENERGY MINES, INC.
RESPONDENTS/CROSS-MOVANTS

DISSENTING OPINION BY JUSTICE REYNOLDS

I respectfully dissent to that portion of the majority opinion that reversed the Court of Appeals upon the issue of innocent trespass and determined that appellees were

willful trespassers. Irrespective of whether or not the Court of Appeals disagreed with trial-court-found facts or inferences, it is manifestly apparent that the trial court and the majority opinion misapplies the law of willful and innocent trespass.

The majority opinion states that the record is silent of any showing by Bethlehem that prior to its entry on Johnson Coal in 1968 it was ever advised by counsel that it had the legal right to do so. Apart from a title report, there were records of deeds and claims from which appellees' map surveys had been prepared, and there was deed survey testimony gleaned from attorney advice that it held mineral tract title to Section 42. It was additional error to reject the advice of reputable counsel thereafter because litigation may have begun.

Perhaps the conclusion of the third and final judge contributed to the enormity of the error; that conclusion being that Bethlehem had somehow promised to do nothing but survey at the time that it sought and obtained injunctive relief. The court, speaking through its records, simply does not support the latter conclusion of the latter judge. A willful trespasser is one who knows when he is wrong and an innocent one is he who believes that he is right. Swiss Oil Corp. v. Hupp, Ky., 69 S.W.2d 1037 (1934), provided:

> The test to be applied is that of intent, but, being a state of mind, it can seldom be proved by direct evidence. The conditions and behavior are usually such that the court can determine whether the trespass was perpetrated in a spirit of wrongdoing, with a knowledge that it was wrong, or whether it was done under a bona fide mistake, as where the circumstances were calculated to induce or justify the reasonably prudent man, acting with a proper

sense of the rights of others, to go in and to continue along the way. And, in judging the trespasser's acts, regard must be had for conditions as they then appeared rather than as disclosed in the light cast backwards by the future. In a word, they are to be judged prospectively, not retrospectively. So, as stated in Loeb v. Conley, 160 Ky. 91, 169 S.W. 575, Ann. Cas. 1916B, 49, whether a trespasser is to be so regarded depends upon the circumstances surrounding the transaction, and it is from those facts and circumstances that the court will determine whether he was acting in good faith and under an honest conviction that he was right in his assumption. Id. at 1041. The Court also listed several factors to be considered as evidencing good faith which included:

There should be at least reasonable doubt of the other party's exclusive or dominant right. The trespasser acted upon the advice of reputable counsel, to whom all the facts had been fairly submitted upon questions of legal right concerning which a layman could hardly have knowledge, such as a disputed title, even though that advice proves to be bad. Of stronger influence, manifestly, is the fact that a court of competent jurisdiction has rendered a favorable judgment upon identical or similar issues. The test is not the trespasser's violation of the law

> in the light of the maxim that every man knows the law, but is his sincerity and his actual intention at the time. A phase entering into the situation may be the character of the property as it pertains to the question of whether delay would endanger loss and action would seem to be urgent.
> Id. at 1041-42.

The situation must be viewed prospectively, not retrospectively. The fact that litigation has commenced in no wise precludes a trespasser from being found innocent, nor does it require that he disbelieve that he is right and know that he is wrong. The trial court erred by surmising that Bethlehem, or any party, was under a duty to litigate the claim in its entirety before mining or acting. See Joyce v. Zachary, Ky., 434 S.W.2d 659 (1968). The 1964 restraining order and the 1971 temporary injunction finding Bethlehem had shown title to minerals under Tract 42 and under standards required for such relief from an earlier judge do, at a minimum, demonstrate probability of prevailing as to the merits of a title claim. A characterization in the majority opinion that "a decision by a trial court on a temporary injunction is not a judgment" is, of itself, a correct pronouncement. It is, however, incorrect when used herein and by its implication that innocent trespass may not be discerned from an action as the one setting forth the grounds in seeking a temporary injunction.

The record does not bear out that Bethlehem said that its only purpose was to go on the land to set up a triangulation point for survey. Preparatory to entering the 1971 injunction was a finding by the trial court that Bethlehem showed ownership rights in the coal in Bethlehem's Denny Vanover Mineral Tract 42.

The legal standards Swiss Oil Corporation, supra, were ignored. Bethlehem added nothing to any delay by seeking summary judgment prior to obtaining injunctive

relief in 1971. This period transcended appellants' motion for relief by way of summary judgment. The development of Johnson's final title claims was long in the making and entered by amendment after the passage of many years. Thus, Bethlehem's reliance on the strength of its own title and reasonable doubts as to the delayed validity of the Johnson title claims was a standard erroneously discarded by the trial court.

I would affirm the Court of Appeals.

Stephens, C.J., and Wintersheimer, J., join in this dissent.

SUPREME COURT OF KENTUCKY

90-SC-081-DG
90-SC-784-DG

CHURCH AND MULLINS CORPORATION;
CLAUDE JOHNSON, Individually, etc.;
CHARLIE JOHNSON; JACK JOHNSON;
MARTHA KENDRICK; PRISCILLA STILTNER;
HAZEL JOHNSON; BEN JOHNSON; ;MOLLY
THORNBERRY; BETTY JANE JOHNSON
STEWART
APPELLANTS/CROSS-APPELLEES

ON REVIEW FROM COURT OF APPEALS
V. NOS. 87-CA-988 and 87-CA-1052
(Pike Circuit Court No. 00-72-88-43D)

BETHLEHEM MINERALS COMPANY;
BETHLEHEM MINES CORPORATION;
BETH-ELKHORN CORPORATION;
BETH ENERGY MINES, INC.
APPELLEES/CROSS-APPELLANTS

ORDER DENYING PETITION FOR REHEARING

The petition for rehearing of the appellees and cross-appellants, Bethlehem Minerals Company, Bethlehem Mines Corporation, Beth-Elkhorn Corporation and Bethenergy Mines, Inc., of the opinion of this Court is denied.

In the petition for rehearing, petitioners assert seven points which they believe this Court failed to consider. In addition to the submitted briefs regarding the petition for

rehearing, oral argument, as requested by petitioners, was presented to this Court by the parties.

Petitioners first claim that the opinion in this action was void as it was rendered in violation of the Kentucky Constitution and in violation of petitioners' due process rights. Petitioners' terse argument as to the validity of the appointment of a special justice to this Court was resolved in the case of Kentucky Utilities v. South East Coal Company, 836 S.W.2d 407 (1992), 113 S.Ct.1147 (1993), cert. dismissed. Furthermore, it is noteworthy that in this case petitioners were granted the relief they requested; after motion by petitioners, Special Justice John Doug Hays, sua sponte, recused himself from further participation in the above-styled action to avoid any appearance of impropriety and this Court granted a second oral argument in this matter. This Court granted Petitioners the relief requested and there is nothing in the opinion of this Court to support the bald assertion by the petitioners that they were denied due process of law in this matter.

Second, petitioners argue that this Court ignored evidence of their reliance on advice of legal counsel regarding the ownership of tract number 42 minerals. This issue was thoroughly reviewed and discussed in this Court's opinion. Petitioner present no additional facts or law persuasive to this Court.

Petitioners next contend that this Court erred by erroneously assuming that innocent trespass cannot occur while a title dispute is being litigated to a conclusion, by determining that petitioners promised not to mine tract number 42 until title was adjudicated, by viewing the trespass issue retrospectively regarding the effect of John Johnson's adverse possession claim and by requiring a party to cease using property when litigation ensues. The litigation in this case spans thirty years; the facts of this property dispute have been vigorously contested since its inception. This Court thoroughly reviewed the record on appeal and applicable recendent in rendering its opinion.

Petitioners present no new facts or law to persuaded us to disturb that result.

Lastly, petitioner claims that this Court erred in reinstating the trial court's award of prejudgment interest to the defendants. The award of prejudgment interest is discretionary with the trial court and was supported by the facts of this case, as discussed in this Court's opinion.

Finding that this petition for rehearing, and the oral argument thereof, bring to light no overlooked material fact from the record, no controlling statute or decision that was misapplied, nor illuminate an issue or law that was misconceived on appeal, the petition for rehearing is denied.

All sitting. All concur, except Wintersheimer, J.

ENTERED November 23, 1994.

/s/ Robert F. Stephens
Chief Justice

Supreme Court, U.S.
FILED
APR 20 1995
OFFICE OF THE CLERK

No. 94-1561

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

BETHLEHEM MINERALS COMPANY,
BETHLEHEM MINES CORPORATION,
BETH-ELKHORN CORPORATION AND
BETHENERGY MINES, INC.,

Petitioners,

v.

CHURCH AND MULLINS CORPORATION,
CLAUDE JOHNSON, CHARLIE JOHNSON, JACK
JOHNSON, MARTHA KENDRICK, PRISCILLA
STILTNER, BEN JOHNSON, MOLLY THORNBERRY
AND BETTY JANE JOHNSON STEWART,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HERMAN W. LESTER
Counsel of Record
207 Caroline Ave.
P.O. Drawer 551
Pikeville, KY 41502
(606) 437-6218

GILBERT K. DAVIS
9516-C Lee Hwy.
Fairfax, VA 22031
(703) 352-3850

GARY C. JOHNSON
P.O. Box 231
Pikeville, KY 41502
(606) 437-4002

S. STROTHER SMITH III
903 E. Main Street
Abingdon, VA 24210
(703) 628-3422

Attorneys for
Respondents

QUESTIONS PRESENTED

1. Whether Petitioners' claim that due process requires vacatur of the Kentucky Supreme Court's June 4, 1992 Opinion was pressed or passed on below.

2. Whether certiorari is precluded by the existence of an independent and adequate state law ground for decision, where Petitioners obtained the relief they requested, since Special Justice Hays recused himself from further participation in the proceedings below and since the Kentucky Supreme Court reconsidered the merits of the willful trespass issue.

3. Whether certiorari must be denied because the controversy is moot, since the Kentucky Supreme Court reheard the willful trespass issue and decided the issue against Petitioners by a 6 to 1 vote.

4. Whether the Kentucky Supreme Court's Order Denying Petitioners' Petition for Rehearing conflicts with Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986), or otherwise raises any important issue of federal law, when there is no record evidence that any Kentucky Supreme Court Justice or Special Justice who participated in the consideration of this case had any direct, personal, substantial, and pecuniary interest in the outcome of this case.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	16
REASONS FOR DENYING THE WRIT	
I. CERTIORARI MUST BE DENIED ON THE GROUND THAT PETITIONERS' CLAIM THAT DUE PROCESS REQUIRES VACATUR OF THE KENTUCKY SUPREME COURT'S JUNE 4, 1992 OPINION WAS NOT PRESSED OR PASSED ON BELOW . .	18
II. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS AN INDEPENDENT AND ADEQUATE STATE LAW GROUND FOR DECISION, SINCE PETITIONERS OBTAINED THE RELIEF THEY REQUESTED, WHEN SPECIAL JUSTICE HAYS RECUSED HIMSELF FROM FURTHER PARTICIPATION IN THE PROCEEDINGS BELOW AND WHEN THE KENTUCKY SUPREME COURT RECONSIDERED THE MERITS OF THE WILLFUL TRESPASS ISSUE . .	21

TABLE OF CONTENTS (CONT'D)

Page

III. CERTIORARI MUST BE DENIED BECAUSE THE CONTROVERSY IS MOOT, SINCE THE KENTUCKY SUPREME COURT REHEARD THE WILLFUL TRESPASS ISSUE AND DECIDED THE ISSUE AGAINST PETITIONERS BY A 6 TO 1 VOTE 26

IV. THE KENTUCKY SUPREME COURT'S ORDER DENYING PETITIONERS' PETITION FOR REHEARING DOES NOT CONFLICT WITH AETNA LIFE INSURANCE CO. v. LAVOIE, 475 U.S. 813 (1986), OR OTHERWISE RAISE ANY IMPORTANT ISSUE OF FEDERAL LAW 28

CONCLUSION 34

APPENDIX

TABLE OF AUTHORITIES

Cases	Page
Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986)	ii, iv, 17, 28 passim
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	20
Bray v. Alexander Clinic, 113 S. Ct. 753 (1993)	33
Clark v. Jeter, 486 U.S. 456 (1988)	19
Coleman v. Thompson, 111 S. Ct. 2546 (1991)	21
Fox Corp. v. Muller, 296 U.S. 207 (1935)	21
In re Murchison, 349 U.S. 133 (1955)	29
Kentucky Utilities v. South East Coal Co., 836 S.W.2d 407 (Ky. 1992), cert. dismissed under Rule 46, 113 S. Ct. 1147 (1993) . . .	10, 15
Lewis v. Continental Bank Corp., 494 U.S. 472 (1990)	26
Michigan v. Long, 463 U.S. 1032 (1983)	23
Murdock v. Memphis, 87 U.S. (20 Wall.) 590 (1875)	21

TABLE OF AUTHORITIES (CONT'D)

Cases	Page
Offutt v. United States, 348 U.S. 11 (1954)	31
Tumey v. Ohio, 273 U.S. 510 (1927)	29
Withrow v. Larkin, 421 U.S. 35 (1975)	31, 32
Ylst v. Nunnemaker, 111 S. Ct. 2590 (1991)	24
Younger v. Harris, 401 U.S. 37 (1971)	12
Statutes	
Ky. Const. § 110	6
Ky. Const. § 123	6, 14
Ky. R. Civ. P. 76.32	13, 25
Ky. Rev. Stat. Ann. § 26A.015 (Michie 1992)	2
U.S. Const. art. III	26

STATEMENT OF THE CASE

This case involves two judgments of the Pike County Circuit Court. The first judgment, entered September 16, 1986, determined title to the mineral estate in a 375-acre tract on Three Mile Creek in Pike County, Kentucky, that is commonly known as "Tract 42" (Sept. 16, 1986 Opinion, Findings of Fact and Conclusions of Law). The Pike County Circuit Court found that Petitioners held title to 164 acres of Tract 42, and that Respondents held title to the remaining 211 acres (Id.). The second judgment, entered February 25, 1987, awarded Respondents damages in the principal sum of $16,947,778, plus prejudgment interest, for willful trespass (Feb. 25, 1987 Opinion, Findings of Fact and Conclusions of Law).

Petitioners appealed to the Kentucky Court of Appeals, which, on January 12, 1990, affirmed the trial court's decision

on title, but which reversed the finding of willful trespass and prejudgment interest and remanded for a recalculation of damages. On September 19, 1990, the Kentucky Supreme Court granted discretionary review.

Supreme Court Justice Dan Jack Combs, sua sponte, recused himself. By Order dated September 17, 1991, the Honorable Robert F. Stephens, the Chief Justice of the Kentucky Supreme Court, appointed John Doug Hays as a Special Justice to replace Justice Combs (Appellants' and Cross-Appellees' Response to Motion to Recuse Special Justice John Doug Hays, Exh. A; App., infra, 1a-2a).

Special Justice Hays's appointment was made pursuant to Ky. Rev. Stat. Ann. § 26A.015(3) (Michie 1992), which authorizes the Chief Justice to appoint a Special Justice when any justice is disqualified. To implement the statute, the

Kentucky Supreme Court adopted a procedure for appointment of a Special Justice (Response to Motion to Recuse, Exh. B; App. 3a-5a). At the beginning of each annual term, each justice is required to provide the Chief Justice with a list of not less than ten attorneys from his judicial district who meet the constitutional requirements for service and who have the ability to serve as a Special Justice (App. 4a). Once advised of a justice's disqualification, the Chief Justice appoints a Special Justice from the list previously submitted to him by the disqualified justice (Id.). John Doug Hays was included on the standing list of qualified attorneys from Justice Combs's judicial district.

Contrary to Petitioners' allegation in its Petition for Certiorari (Petition for Writ of Certiorari at 4, 6), Justice Combs did not "personally select" or

"personally designate" John Doug Hays to serve as Special Justice. The Kentucky Supreme Court's September 17, 1991 Order, entered by the Deputy Chief Justice Charles Leibson, states:

> Honorable John D. Hays, a member of the Kentucky Bar with offices in Pikeville, Kentucky, who was appointed by Chief Justice Robert F. Stephens to sit as special justice of the Supreme Court in the determination of this cause by reason of the disqualification of Justice Dan Jack Combs, was on September 17, 1991, prior to any consideration of this cause, administered the Constitutional Oath by the undersigned.

(App. 1a-2a.) Petitioners' allegation that Justice Combs designated Special Justice Hays is based solely on a newspaper article in the Lexington Herald-Leader, dated June 25, 1992. The article quotes Justice Combs as stating: "I just suggested to the Chief Justice that he (Hays) would be a fine special judge. There was no special reason" (Bethlehem Memorandum in Support of Supplemental

Motion to Recuse Special Justice John Doug Hays, Exh. A at B1).

On June 4, 1992, the Kentucky Supreme Court rendered its decision, which reversed in part the court of appeals and reinstated in all respects the judgment of the Pike County Circuit Court (Petition for Writ of Certiorari at App. 1a). The majority opinion was written by Special Justice Hays with the concurrence of three justices; three justices dissented.

On June 24, 1992, Petitioners filed a Petition for Rehearing and a Motion to Recuse Special Justice Hays. The Petition for Rehearing sought reconsideration of the Supreme Court's decision on willful trespass, damages, and prejudgment interest, and incorporated by reference the arguments in the Motion to Recuse (Bethlehem Petition for Rehearing at 2). In seeking recusal, Petitioners wrote that they did not "call into question the

integrity of any member of the Court or Special Justice who sat in this case" (Bethlehem Memorandum in Support of Motion to Recuse Special Justice John Doug Hays at 2). The Petitioners alleged instead that the court's procedure for appointing a Special Justice violated §§ 110(3) and 123 of the Kentucky Constitution (Id. at 6-11). The Petitioners further alleged that Special Justice Hays's impartiality might reasonably be questioned because of his former professional association with the trial judge after the trial judge had left the bench, and because of Hays's withdrawal from representation of third parties involved in unrelated litigation brought against Petitioner BethEnergy Mines, Inc. (Id. at 11-15).[1]

---

[1]In the Motion to Recuse, Petitioners complained of Special Justice Hays's previous participation in another trespass action brought against Petitioner BethEnergy Mines, Inc., Osborne v. Beth-

Although the Petitioners were aware from the very instant of Special Justice Hays's appointment of all of the predicate facts upon which they based their Motion to Recuse, the Petitioners concededly waited over nine months to file the Motion, until after the Kentucky Su-

---

Energy Mines, Inc., Civil Action No. 88-100 (Pike Cir. Ct.), an unrelated case involving different creditors and different transactions (Bethlehem Memorandum in Support of Motion to Recuse Special Justice John Doug Hays at 3-4, Exh. B). On June 3, 1988, Special Justice Hays withdrew from representation of the plaintiffs in the Osborne case. Hays's withdrawal was based on the fact that his firm, Stratton, May & Hays, P.S.C., had represented Petitioners in another case (Appellants' Response to Motion to Recuse, Exh. 6). Moreover, Petitioners complained that the trial judge in this case, William T. Scott, had been a partner of Stratton, May & Hays for approximately two years after Judge Scott had left the bench (Bethlehem Memorandum in Support of Motion to Recuse Special Justice John Doug Hays at 13-15). Judge Scott had left the firm long before Special Justice Hays had been appointed in this case.

preme Court had rendered its June 4, 1992 Opinion against Petitioners (Id. at 17).[2]

Petitioners' Motion to Recuse and Petition for Rehearing sought prospective relief. Petitioners prayed that "Special Justice Hays . . . be recused from any further proceedings in this appeal and the Opinion of the Court of Appeals affirmed or, alternatively, this case must be reconsidered in its entirety by a constitutionally constituted court"

---

[2]In their Motion to Recuse, Petitioners stated that they delayed filing the Motion in order to avoid antagonizing the court before the court issued its opinion (Bethlehem Memorandum in Support of Motion to Recuse Special Justice John Doug Hays at 17).

Petitioner BethEnergy Mine, Inc.'s counsel of record in the Kentucky Supreme Court, John M. Stephens and Lively M. Wilson, also represented Petitioner BethEnergy in the Osborne case (Appellants' Response to Motion to Recuse, Exh. C). Petitioners' counsel could not have avoided being aware, because of their frequent dealings with the firm of Stratton, May & Hays, of Judge Scott's previous association with this prominent Kentucky firm.

(Bethlehem Memorandum in Support of Motion to Recuse Special Justice John Doug Hays at 1-2 (emphasis added)). Similarly, the Petition for Rehearing prayed that the court of appeals' decision be "affirmed or, alternatively, this case reconsidered in its entirety" (Bethlehem Petition for Rehearing at 10).

On July 6, 1992, Petitioners filed a Motion for Leave to File a Supplemental Motion to Recuse Special Justice Hays and a Supplemental Petition for Rehearing. In this Motion, for the first time, Petitioners alleged that they were denied due process because the Chief Justice had selected Special Justice Hays at Justice Combs's suggestion (Bethlehem Memorandum in Support of Supplemental Motion to Recuse Special Justice John Doug Hays at 2). In their Supplemental Petition and Motion, Petitioners again demanded that "Special Justice Hays . . . be recused

from further participation in this appeal," and the appeal "reconsidered in its entirety by a constitutionally constituted court" (Id. at 5; Bethlehem Proposed Supplemental Petition for Rehearing at 1).

On August 25, 1992, the Kentucky Supreme Court decided Kentucky Utilities v. South East Coal Co., 836 S.W.2d 407 (Ky. 1992), cert. dismissed under Rule 46, 113 S. Ct. 1147 (1993). In that decision, the court upheld its procedure for appointment of a Special Justice, rejecting arguments based on the Kentucky Constitution.

On August 28, 1992, two Orders were entered by the Supreme Court of Kentucky in the instant litigation. In the first Order, Special Justice Hays recused himself sua sponte from further participation (Special Justice John Doug Hays's Order of Aug. 28, 1992 at App. 6a-7a),

thereby providing Petitioners with the precise relief requested. Although finding that Petitioners' Motion to Recuse stated no grounds for disqualification, Special Justice Hays stated that he acted in order to avoid any further allegation of impropriety (Id. at App. 7a).

In the second Order, the Kentucky Supreme Court denied Petitioners' Motion to Recuse and Motion to File a Supplemental Petition for Rehearing as moot, based upon Justice Hays's sua sponte recusal from further participation (Chief Justice Stephens's Order of Aug. 28, 1992 at App. 8a-8b). The supreme court further granted Petitioners' oral argument in support of their Petition for Rehearing (Id.).

On August 25, 1992, Petitioners filed a civil rights action in the United States District Court for the Eastern District of Kentucky against the individ-

ual justices of the Kentucky Supreme Court, Bethlehem Minerals Co. v. John Doug Hays et al., No. 92-86 (E.D. Ky., filed Aug. 25, 1992). The complaint sought injunctive relief to vacate the Kentucky Supreme Court's June 4, 1992 Opinion, on the same substantive grounds Petitioners had asserted in their pending petition for rehearing in state court. On January 20, 1993, the federal district court dismissed the complaint in the exercise of its discretion to abstain under the Younger v. Harris, 401 U.S. 37 (1971), doctrine (Jan. 20, 1993 Order).

After the federal district court dismissal, Petitioners filed a Motion for Leave to File a Second Supplemental Petition for Rehearing. Although ostensibly for the purpose of presenting supplemental authority related to the original petition for rehearing, Petitioners' Motion also included a proposed amendment

to their prayer for relief. The amendment omitted Petitioners' demand for reconsideration and sought in lieu thereof that Special Justice Hays's vote be excluded from the supreme court's tally and that the decision of the court of appeals be affirmed by a 3 to 3 vote (Bethlehem Proposed Supplemental Petition for Rehearing at 4). Respondents opposed this Motion, arguing that Petitioners had failed to file their Supplemental Petition within the 20-day period allowed by Ky. R. Civ. P. 76.32(2) and that the Special Justice issue should not be resurrected (Response and Objection to Motion for Leave to File Second Supplemental Petition for Rehearing at 2). On December 14, 1993, the Kentucky Supreme Court denied Petitioners' Motion without com-

ment (Dec. 14, 1993 Order at App. 11a-12a).[3]

After Justice Combs retired from the bench, a special election to select his replacement to serve out his term was held. On August 27, 1993, the Kentucky Supreme Court entered an Order assigning the Petition for Rehearing for oral argument on December 15, 1993 before the full court (Chief Justice Stephens's Aug. 28, 1993 Order).[4] At oral argument, Chief

---

[3]In response to the dismissal of their federal action, Petitioners also filed a Motion to Enter Judgment and to Withdraw Petition for Rehearing if Motion Granted. This Motion, however, did not raise any federal question. The Motion alleged that the Kentucky Supreme Court's June 4, 1992 Opinion was void because it was rendered in violation of § 123 of the Kentucky Constitution (Bethlehem Motion to Enter Judgment and to Withdrawal Petition for Rehearing If Motion Granted at 2).

[4]Oral argument on Petitioners' Petition for Rehearing was consolidated with oral argument in a related case, Bethlehem Minerals Co. v. Church & Mullins Corp., No. 93-SC-587-TG (Pike Cir. Ct.), which was an appeal by Petitioners from the Pike County Circuit Court's denial of

Justice Stephens advised Petitioners' counsel that the court had upheld the constitutionality of its procedure for appointment of a Special Justice in the Kentucky Utilities case (Dec. 15, 1993 Tape of Oral Argument, 12:06:50 to 12:09:39).

On November 23, 1994, the Kentucky Supreme Court denied Petitioners' Petition for Rehearing by a 6 to 1 vote (Order Denying Petition for Rehearing, Petition for Writ of Certiorari at App. 16a). The court rejected all of Petitioners' state law arguments (Id. at App. 17a-18a). In response to Petitioners' due process theory, the court stated:

> [I]t is noteworthy that in this case petitioners were granted the relief they requested; after motion by petitioners,

---

Petitioners' Motion to Vacate the Pike County Circuit Court judgments. On November 23, 1994, the Kentucky Supreme Court unanimously affirmed the trial court's denial of Petitioners' Motion to Vacate the judgments.

> Special Justice John Doug Hays, sua sponte, recused himself from further participation in the above-styled action to avoid any appearance of impropriety and this Court granted a second oral argument in this matter. The Court granted Petitioners the relief requested and there is nothing in the opinion of this Court to support the bald assertion by the petitioners that they were denied due process of law in this matter.

(Id. at App. 17a (emphasis added).)

SUMMARY OF THE ARGUMENT

Certiorari should be denied because Petitioners' claim that vacatur is the only available remedy to cure the alleged due process violation was not pressed or passed upon below. Moreover, certiorari should be denied because there is an independent and adequate state law ground for decision, which is that Petitioners obtained below the relief they had requested. Furthermore, certiorari should be denied because the Kentucky Supreme

Court's rehearing on the merits makes this controversy moot.

Even assuming arguendo that there is no procedural bar to review in this Court, certiorari should be denied because the Kentucky Supreme Court's Order Denying Petitioners' Petition for Rehearing does not conflict with Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986), or otherwise raise any important issue of federal law. Petitioners do not allege that any justice or Special Justice who participated in the June 4, 1992 decision had any direct, personal, substantial, and pecuniary interest in the outcome. There is no record evidence to support Petitioners' allegation that Justice Combs had any such interest in the decision, but, in any event, he recused himself from consideration on the merits. Petitioners' allegation that Justice Combs personally selected Special Justice

Hays is not supported by the record and does not provide a basis for any substantial federal due process claim.

REASONS FOR DENYING THE WRIT

I. CERTIORARI MUST BE DENIED ON THE GROUND THAT PETITIONERS' CLAIM THAT DUE PROCESS REQUIRES VACATUR OF THE KENTUCKY SUPREME COURT'S JUNE 4, 1992 OPINION WAS NOT PRESSED OR PASSED ON BELOW.

Petitioners assert that prospective recusal of Special Justice Hays did not cure the denial of due process and that vacatur is the only acceptable remedy (Petition for Writ of Certiorari at 12). However, this claim was not pressed by Petitioners or passed on by the Kentucky Supreme Court, and therefore the claim has been procedurally defaulted. In reviewing the decisions of state courts, this Court will not decide federal claims that were not pressed or passed on below.

Clark v. Jeter, 486 U.S. 456, 459-60 (1988).

Petitioners sought prospective recusal and reconsideration in their pleadings below as the remedy for the alleged due process violation (Bethlehem Motion to Recuse at 1-2; Bethlehem Petition for Rehearing at 10; Bethlehem Memorandum in Support of Supplemental Motion to Recuse Special Justice John Doug Hays at 5; Bethlehem Proposed Supplemental Petition for Rehearing at 1). In Petitioners' proposed Second Supplemental Petition for Rehearing, Petitioners, for the first time, demanded that Special Justice Hays's vote be excluded and the court of appeals' decision be affirmed on a 3 to 3 vote (Bethlehem Proposed Supplemental Petition for Rehearing at 4). However, the proposed Supplemental Petition, which the Kentucky Supreme Court refused to hear because of Petitioners' procedural

default, requested this remedy only for alleged violations of the Kentucky Constitution (Id. at 1-3). Petitioners did not mention the federal due process clause, let alone request vacatur for denial of due process (Id.). Petitioners' failure to allege that due process required affirmance of the court of appeals' decision or vacatur of the Kentucky Supreme Court's June 4, 1992 Opinion bars them from making this claim on appeal. See Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77-78 (1988) (challenge to punitive damages award barred where appellant failed to refer to federal excessive fines clause as basis for its claim that damages awarded were excessive).

II. CERTIORARI SHOULD BE DENIED BECAUSE THERE IS AN INDEPENDENT AND ADEQUATE STATE LAW GROUND FOR DECISION, SINCE PETITIONERS OBTAINED THE RELIEF THEY REQUESTED, WHEN SPECIAL JUSTICE HAYS RECUSED HIMSELF FROM FURTHER PARTICIPATION IN THE PROCEEDINGS BELOW AND WHEN THE KENTUCKY SUPREME COURT RECONSIDERED THE MERITS OF THE WILLFUL TRESPASS ISSUE.

This Court will not consider an issue of federal law on direct review from the judgment of a state court if that judgment rests on a state law ground that is independent of the merits of the federal claim and is an adequate basis for the court's decision. Fox Corp. v. Muller, 296 U.S. 207, 210 (1935); Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875). This rule applies regardless of whether the state law ground is substantive or procedural. Coleman v. Thompson, 111 S. Ct. 2546, 2554 (1991).

An independent and adequate state law ground for the decision here is that Petitioners obtained the relief they had

requested below. Petitioners sought only prospective recusal of Special Justice Hays and reconsideration on the merits in their Supplemental Motion to Recuse and in their Supplemental Petition for Rehearing, where Petitioners raised for the first time a claim that they were denied due process because Justice Combs allegedly had suggested Special Justice Hays's appointment (Bethlehem Memorandum in Support of Supplemental Motion to Recuse Special Justice John Doug Hays at 5; Bethlehem Proposed Supplemental Petition for Rehearing at 1). Petitioners obtained the precise relief requested: Special Justice Hays recused himself from further participation in this case, and the Kentucky Supreme Court granted Petitioners a rehearing on the merits.

Although the Order Denying Petitioners' Petition for Rehearing also states that there was no due process violation,

the plain statement rule of Michigan v. Long, 463 U.S. 1032 (1983), and its progeny has no application here. Under Long, if "it fairly appears that the state court rested its decision primarily on federal law, or to be interwoven with federal law," this Court may reach the federal question unless the state court's opinion contains a "'plain statement' that [its] decision rests upon adequate and independent state grounds." Id. at 1042.

Viewed in its full context, the Kentucky Supreme Court's decision rested primarily on the basis that Petitioners had obtained the relief requested, i.e., prospective recusal of Special Justice Hays and a rehearing on the merits. The August 28, 1992 Order denied Petitioners' Motion to Recuse and Motion for Leave to File a Supplemental Petition for Rehearing, expressly on this basis. Since this

Order clearly was based on state law, this Court must presume that the subsequent denial of Petitioners' Petition for Rehearing did not silently disregard the state law ground as an adequate and independent ground for decision. See Ylst v. Nunnemaker, 111 S. Ct. 2590, 2594, 2596 (1991). In denying the Petition for Rehearing, the Kentucky Supreme Court did not ignore the procedural bar; it expressly held that Petitioners had obtained the relief requested.

Moreover, although Petitioners complain now that the Kentucky Supreme Court did not apply a de novo standard of review in rehearing this case, Petitioners did not request de novo review in their Petition for Rehearing. Petitioners presented no new arguments on the merits in their Petition for Rehearing, and the justices were singularly unimpressed with Petitioners' Petition.

Seven months after the court had entered its August 28, 1992 Order, the court denied as untimely Petitioners' Motion for Leave to File a Second Supplemental Petition for Rehearing. If granted, this Motion would have withdrawn Petitioners' demand for reconsideration in lieu of a demand that Special Justice Hays's vote be treated as void and that the court of appeals' decision be affirmed by a 3 to 3 vote. Since this Motion was denied as a result of Petitioners' procedural default,[5] there is an independent and adequate ground for the

---

[5]Although the Order denying Petitioners' leave to file their proposed second Supplemental Petition gave no rationale, it is clear that the Order was based on Petitioners' procedural default. Respondents opposed the Motion solely on the state law ground that it was untimely and that the Special Justice issue should not be resurrected. Ky. R. Civ. P. 76.32(2) requires that a Petition for Rehearing be filed within 20 days of the court's decision, and the time limitation may not be waived. The court accordingly did not reach the merits of the second Supplemental Petition.

Kentucky Supreme Court's denial of leave to supplement Petitioners' Petition for Rehearing.

Under all of these circumstances, certiorari must be denied, since there is an independent and adequate state law ground for the decision. Petitioners obtained below the relief they requested, and Petitioners' Motion for Leave to File a Second Supplemental Petition for Rehearing was denied based on Petitioners' procedural default.

III. CERTIORARI MUST BE DENIED BECAUSE THE CONTROVERSY IS MOOT, SINCE THE KENTUCKY SUPREME COURT REHEARD THE WILLFUL TRESPASS ISSUE AND DECIDED THE ISSUE AGAINST PETITIONERS BY A 6 TO 1 VOTE.

Under Article III of the Constitution, federal courts may adjudicate only actual ongoing cases or controversies. Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990). Article III denies to

federal courts the power to decide questions that cannot affect the rights of litigants. Id. at 477. Moreover, the case-or-controversy requirement exists through all stages of trial and appellate proceedings. Id.

Petitioners allege that due process requires vacatur of the Kentucky Supreme Court's June 4, 1992 Opinion and reconsideration of the decision on its merits by a properly constituted court. However, Petitioners already have obtained a rehearing by a regularly constituted panel of justices on the merits of their willful trespass issue, which is the only substantive issue preserved by Petitioners in their Petitioner for Rehearing. The Kentucky Supreme Court's November 23, 1994 Order Denying Petition for Rehearing clearly reached and decided adversely to Petitioners the merits of the case, by a 6 to 1 vote. Because Petitioners already

have obtained all the relief to which they are entitled, the case is moot.

IV. THE KENTUCKY SUPREME COURT'S ORDER DENYING PETITIONERS' PETITION FOR REHEARING DOES NOT CONFLICT WITH AETNA LIFE INSURANCE CO. v. LAVOIE, 475 U.S. 813 (1986), OR OTHERWISE RAISE ANY IMPORTANT ISSUE OF FEDERAL LAW.

Petitioners' argument that Special Justice Hays is clothed with the same cloak of disqualification worn by Justice Combs because Justice Hays was selected from Justice Combs's standing list of qualified attorneys is nothing less than a direct challenge to Kentucky's judicial selection system. Petitioners have no support for their theory that due process requires federal supervision of Kentucky's judicial selection process.

Petitioners correctly recognize that Aetna Life Insurance Co. v. Lavoie, supra, 475 U.S. at 828, defines the circumstances where due process requires

judicial disqualification of a particular justice for reasons peculiar to that case. In Aetna Life, the Court observed that not "[a]ll questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would generally seem to be matters merely of legislative discretion." Id. at 820 (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)). Due process, however, requires that no judge "be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." Aetna Life Insurance Co. v. Lavoie, supra, 475 U.S. at 822 (quoting In re Murchison, 349 U.S. 133, 136 (1955)). The Court concluded that due process is violated where a judge has a "direct, personal, substantial, pecuniary interest in reaching a conclusion." Aetna Life Insurance Co. v.

Lavoie, supra, 475 U.S. at 820. In Aetna, due process was violated by the participation of an Alabama Supreme Court justice in a decision addressing unsettled issues affecting the recovery of punitive damages for bad-faith refusal to pay an insurance claim where identical legal issues were present in two pending state court actions filed by the justice against insurance companies. Id. at 823-24.

The present case does not bear even the remotest resemblance to the situation in Aetna Life. Unlike Aetna Life, Petitioners do not contend in their Petition for a Writ of Certiorari that any Supreme Court justice or Special Justice who participated in the decision in this case had any direct, personal, substantial, and pecuniary interest in the outcome. Petitioners instead allege that Justice Combs had a direct, personal, substan-

tial, and pecuniary interest in the outcome of this case when the Kentucky Supreme Court granted discretionary review. The record contains no evidence to support such an allegation, but even assuming arguendo that the allegation were true, there would be no denial of due process.

The due process clause protects against situations where there is a high probability of actual bias on the part of the decisionmaker. See Withrow v. Larkin, 421 U.S. 35, 47 (1975); Offutt v. United States, 348 U.S. 11, 17-18 (1954). Justice Combs recused himself and did not vote or otherwise participate in the panel that decided this case. There is no evidence that any decisionmaker below violated the Aetna Life constitutional barrier by "act[ing] as a judge in his own case." Aetna Life Insurance Co. v. Lavoie, supra, 475 U.S. at 824.

Petitioners' allegation that their due process rights were violated by Justice Combs's direction or selection of his replacement raises no substantial federal question. In the first instance, the Kentucky Supreme Court's records, through which the court speaks, establish that Chief Justice Stephens, not Justice Combs, selected Special Justice Hays.

Moreover, Petitioners' suggestion that the unconstitutional risk of bias is created when a recused justice suggests his replacement is meritless. There is a "presumption of honesty and integrity in those serving as adjudicators." Withrow v. Larkin, supra, 421 U.S. at 47. Petitioners have not set forth any legal or factual basis for their allegation that the Kentucky Supreme Court's procedure for appointment of a Special Justice results in biased decisionmaking or otherwise warrants the extraordinary action of

federal interference with Kentucky's judicial selection process.

Petitioners do not allege in their Petition for a Writ of Certiorari that Justice Combs's replacement, Special Justice Hays, or any other justice who sat in decision of this case, had any direct, personal, substantial, and pecuniary interest in the outcome. They have waived any right to make such a claim here. See Bray v. Alexander Clinic, 113 S. Ct. 753, 765 (1993).

CONCLUSION

The Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

HERMAN W. LESTER
Counsel of Record
207 Caroline Avenue
P.O. Drawer 551
Pikeville, KY 41502
(606) 437-6218

GILBERT K. DAVIS
9516-C Lee Highway
Fairfax, VA 22031
(703) 352-3850

GARY C. JOHNSON
P.O. Box 231
Pikeville, KY 41502
(606) 437-4002

S. STROTHER SMITH III
903 E. Main Street
Abingdon, VA 24210
(703) 628-3422

Attorneys for Respondents

APPENDIX

SUPREME COURT OF KENTUCKY

90-SC-081-DG

CHURCH AND MULLINS CORPORATION, ET AL. — APPELLANTS

ON REVIEW FROM COURT OF APPEALS
NO. 87-CA-001052
(Pike Circuit Court No. 00-72-88-43D)

V.

BETHLEHAM MINERALS COMPANY, ET AL. — APPELLEES

to be heard with:

90-SC-000784-DG

BETHLEHAM MINERALS COMPANY, ET AL. — APPELLANTS

ON REVIEW FROM COURT OF APPEALS
NO. 87-CA-001052
(Pike Circuit Court No. 00-07-28843D)

V.

CHURCH AND MULLINS CORPORATION, ET AL. — APPELLEES

ORDER

Honorable John D. Hays, a member of the Kentucky Bar with offices in Pikeville, Kentucky, who was appointed by Chief Justice Robert F. Stephens to sit as special justice of the Supreme Court

in the determination of this cause by reason of the disqualification of Justice Dan Jack Combs, was on September 17, 1991, prior to any consideration of this cause, administered the Constitutional Oath by the undersigned.

ENTERED September 17, 1991.

Charles M. Leibson
Deputy Chief Justice

PROCEDURE FOR APPOINTMENT OF A SPECIAL JUSTICE OF THE SUPREME COURT OF KENTUCKY

This Court hereby adopts the following policy to be employed when one member of the Court is disqualified from sitting in a case. SCR 1.020(1), Ky. Const. §116.

1. Jurisdiction

Pursuant to KRS 26A.015(3)(a), any Justice disqualified under the provisions of that section shall be replaced by the Chief Justice.

Therefore, if a justice disqualifies himself from participation in the consideration of a case before it is ready for review by the members of the Court, the Chief Justice shall appoint an attorney to serve as a Special Justice of the Kentucky Supreme Court. A case is "ready for review" within the meaning of this rule ten days before it is scheduled for oral argument.

2. Selection of Special Justice

At the beginning of the annual term of the Supreme Court each justice shall provide the Chief Justice with a list of not less than ten attorneys from his district who meet the constitutional qualifications for service and have the ability to serve as a special justice.

Once advised of a justice's disqualification, the Chief Justice shall appoint a special justice from the list previously submitted to him by the disqualified justice.

3. Notice of Selection

An order appointing a special justice shall be filed with the Clerk of the Supreme Court and entered in the record of the case. Copies of the order of appointment shall be circulated to the Special Justice, the Justices of the Supreme Court and the parties to the action.

4. Service as Special Justice

The Supreme Court Administrator shall coordinate the service of Special Justices of the Supreme Court. Compensation for each 7.5 hour day of service as a Special Justice is $262.53 per day, plus 20.5 per mile for travel connected with court service.

All sitting. All concur except Wintersheimer, J., dissents.

ENTERED October 16, 1989.

Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

90-SC-000081-DG
90-SC-000784-DG

CHURCH AND MULLINS CORPORATION;
CLAUDE JOHNSON, Individually, etc.;
CHARLIE JOHNSON; JACK JOHNSON;
MARTHA KENDRICK; PRISCILLA STILTNER;
HAZEL JOHNSON; BEN JOHNSON; MOLLY
THORNBERRY; BETTY JANE JOHNSON
STEWARD

MOVANTS/CROSS-RESPONDENTS

ON REVIEW FROM COURT OF APPEALS
NOS. 87-CA-000988 and 87-CA-001052
(Pike Circuit Court No. 00-72-88-43D)

V.

BETHLEHEM MINERALS COMPANY;
BETHLEHEM MINES CORPORATION;
BETH-ELKHORN CORPORATION;
BETH ENERGY MINES, INC.

RESPONDENTS/CROSS-MOVANTS

ORDER

Comes John Doug Hays, duly appointed Special Justice of the Supreme Court of Kentucky, being advised of the motion of respondents/cross-movants for his recusal by the Supreme Court of Kentucky, and hereby sua sponte recuses himself from further deliberation and participation in

the proceedings in the above styled actions. No grounds have been stated by the respondents/cross-movants which would justify the disqualification of this Special Justice, pursuant to KRS 26A.015(3)(a). However, in order to avoid any further allegation or appearance of impropriety, said Special Justice hereby recuses himself from further participation in the above-styled action.

John Doug Hays
John Doug Hays

ENTERED: August 28, 1992.

SUPREME COURT OF KENTUCKY

90-SC-000081-DG
90-SC-000784-DG

CHURCH AND MULLINS CORPORATION;
CLAUDE JOHNSON, Individually, etc.;
CHARLIE JOHNSON; JACK JOHNSON;
MARTHA KENDRICK; PRISCILLA STILTNER;
HAZEL JOHNSON; BEN JOHNSON; MOLLY
THORNBERRY; BETTY JANE JOHNSON
STEWART

MOVANTS/CROSS-RESPONDENTS

ON REVIEW FROM COURT OF APPEALS
NOS. 87-CA-000988 and 87-CA-001052
(Pike Circuit Court No. 00-72-88-43D)

V.

BETHLEHEM MINERALS COMPANY;
BETHLEHEM MINES CORPORATION;
BETH-ELKHORN CORPORATION;
BETH ENERGY MINES, INC.

RESPONDENTS/CROSS-MOVANTS

ORDER

This Court being advised that in the interest of avoiding any appearance of impropriety on his part or the part of this Court, Special Justice John Doug Hays has sua sponte recused himself from further participation herein, the motion of respondents/cross-movants to recuse

Special Justice John Doug Hays from further deliberations and participation in the above-styled actions is denied as being moot.

The motion of respondents/cross-movants for oral argument in support of their petition for rehearing is granted. Such oral argument will be scheduled by further order of this Court.

The motion of respondents/cross-movants for oral argument in support of their motion to recuse Special Justice Hays is denied as being moot.

The motion of respondents/cross-movants for leave to file a supplemental petition for rehearing is denied because the additional evidence contained therein pertains to the participation of Special Justice John Doug Hays whose recusal renders said issue moot.

Stephens, C.J. and Lambert, Leibson, Reynolds, Spain and Wintersheimer, JJ.,

sitting. Combs, J., not sitting. All concur.

ENTERED August 28, 1992.

Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

90-SC-000081-DG
90-SC-000784-DG
93-SC-000587-TG

BETHLEHEM MINERALS COMPANY,
BETHLEHEM MINES CORPORATION,
BETH-ELKHORN CORPORATION, AND
BETHENERGY MINES, INC.

APPELLANTS, APPELLEES
AND CROSS APPELLANTS

APPEAL FROM COURT OF APPEALS
NO. 87-CA-000988, NO. 87-CA-0001052
AND NO. 93-CA-1299
(Pike Circuit Court No. 00-07-28843D)

V.

CHURCH AND MULLINS CORPORATION,
CLAUDE JOHNSON, Administrator of
the Estate of John Johnson and
Individually, CHARLIE JOHNSON,
JACK JOHNSON, MARTHA KENDRICK,
PRISCILLA STILTNER, HAZEL JOHNSON,
BEN JOHNSON AND MOLLY THORNBERRY,
AND BETTY JANE JOHNSON STEWART

APPELLEES, APPELLANTS
AND CROSS-APPELLEES

ORDER

Appellees' motion for leave to file a second supplemental petition for re-hearing is denied.

Lambert, Leibson, Reynolds and Spain, JJ., sitting. All concur.

ENTERED December 14, 1993.

Robert F. Stephens
Chief Justice